In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-938

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, *Petitioners,*

VS.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, and PORTS OF ANACORTES, BELLINGHAM, EVERETT, GRAYS HARBOR, OLYMPIA, PORT ANGELES, PORTLAND AND TACOMA, *Respondents.*

BRIEF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

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Pursuant to Rule 24, International Longshoremen's and Warehousemen's Union (ILWU) hereby files its brief in opposition to petition for certiorari.

JURISDICTION

ILWU does not challenge the jurisdictional statement in the Petition but urges that this Court exercise its discretionary power under 28 U.S.C. 1254(1) to deny the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia.

QUESTIONS PRESENTED

To avoid unnecessary repetition, ILWU has been afforded the opportunity of reviewing a draft of the Pacific Maritime Association (PMA) Brief in Opposition to the Petition.

ILWU agrees with PMA that the first question presented by the Petition is not presented in this case and that a conflict between the courts of appeal does not now exist and will not exist unless a court of appeals for some other circuit should decide that the Federal Maritime Commission (FMC) has jurisdiction over a good-faith collective bargaining agreement. ILWU agrees that the first question as stated by PMA is the only question properly presented by the decision of the Court of Appeals for the District of Columbia.

For the purpose of argument only, and except for the manner in which the ILWU-PMA agreement is characterized, ILWU accepts the Petition's second question. That agreement does *not* "impose conditions on employers who are not parties to the agreement." The ILWU-PMA agreement at most "affects" the in-

terests of those employers by affording them choices they might not otherwise have in their separate and independent negotiations with ILWU; the ILWU-PMA agreement does not foreclose those employers from requiring ILWU to bargain in good faith with respect to alternative uses of the industry's pool of registered dockworkers and alternative participation in fringe-benefit programs developed and maintained through industry-wide negotiations.

STATEMENT

ILWU accepts the statement of facts as presented in PMA's Brief, noting, however, that insofar as the Petition's first question may be involved, any differences between the statements of the Petition and PMA's Brief are irrelevant.

ILWU supplements PMA's statement in the following particulars:

Supplemental Memorandum No. 4 and the Revised Agreement adopted in 1972 and 1973 (the Agreement) negotiated between ILWU and PMA were the result of bona fide collective bargaining between the parties over an issue that had been troublesome for a number of years. (J.A. 189)

Some non-members had been participating in only some of the fringe benefits programs and PMA had accepted contributions from non-members on a piecemeal basis (J.A. 173, 176, 181, 189). Indeed, some non-member ports were not using the central pay

offices where the members of the bargaining unit received their checks. (J.A. 177, 213)

ILWU therefore made the first proposal[1] in the 1972 negotiations that "PMA will accept *all* fringe benefit contributions from *any* employer (J.A. 170)." PMA's response was to propose the elimination of "non-member participation under *any* provisions of the Agreement." (*ibid.*) In the ensuing negotiations ILWU won its major demand: the Agreement provides that non-members shall participate in all the fringe benefit plans (Petition, 5a n.6). In order to prevail on that issue, ILWU agreed that the non-members should be treated as members were treated. Collective bargaining is not a one-way street and in order to achieve its main objective ILWU had to yield to some of PMA's demands, but it was a negotiated-for, arm's length deal.

Since the "prior restraint procedures of Section 15 [of the Shipping Act of 1916; 46 USC 814] (the Shipping Act) imposes such an extraordinary burden on collective bargaining" (Petition 2a), the court of appeals correctly held that the Agreement was outside the scope of that section. Because the decision of the court of appeals is consistent with this Court's decision in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261 (1968); because it faithfully mirrors the legislative history of Section 15; and because it correctly states the public policy which governs in these maritime collective bargain-

[1]Petitioners' formulation (Petition, 4) could leave the erroneous implication that the first proposal came from PMA.

ing/shipping/anti-trust situations, it does not require review by this court. *New York Shipping Association v. Federal Maritime Commission,* 495 F.2d 1215, 2nd Cir., 1974, *cert. denied* 419 U.S. 964 (1974) is distinguishable from the instant case and, upon analysis, is not in conflict with it.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. In *Volkswagenwerk,* this Court made it crystal clear that it was *not* dealing with a collective bargaining contract.

> ". . . it is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing of requirements of §15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing valdity. But in negotiating with the ILWU, the Assocation insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement, affecting only relationships among Asso-

ciation members and their customers, is all that is before us in this case. . . ." (390 U.S. at 278)[2]

No decision of this Court suggests that a collectively bargained agreement covering the terms and conditions of employment resulting from good-faith, "eyeball-to-eyeball" negotiations between a union certified as the collective bargaining representative of a unit of employees and a group of employers is subject to review and approval by an executive regulatory agency like the FMC. On the contrary, it is now clearly established that industry-wide bargaining by employers joined together within an association does not contravene any antitrust policies and is within the National Labor Relations Act. *NLRB v. Truck Drivers Local 449,* 353 U.S. 87 (1957); *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261, 283 (1968). Further, many decisions of this Court have confirmed that Congress has rejected a system of executive agency regulation for the settlement of labor-management problems and has encouraged and protected the free play of the collective bargaining process as the best means of achieving harmonious and stable labor-management relations.[3] *NLRB v. Insurance Agents' International,* 361 U.S. 477, 488-90 (1960); see also, *Teamsters Union v. Oliver,* 358 U.S. 283, 295-96 (1959).

[2]Mr. Justice Harlan agreed: ". . . no collective bargaining agreement in the maritime industry is now before us . . ." 390 U.S. at 287. See also, *ibid.* at 290.

[3]Moreover, an early congressional experiment to subject labor-management relations in the maritime industry to the jurisdiction of a regulatory agency like FMC was soon abandoned. See Douglas, J., dissenting in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n., supra* at 296, 299-301.

In the only decision of this Court in which a labor related agreement among maritime employers was found to be within the regulatory scheme of the Shipping Act and the jurisdiction of the FMC, this Court, as pointed out above, carefully limited the reach of the decision and explicitly emphasized that an agreement resulting from free collective bargaining between a union and employers was not subject to the jurisdiction and surveillance of the FMC under section 15 of the Shipping Act. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, supra* at 278. The decision of the court of appeals accords with the teachings of this Court and its specific admonitions in *Volkswagenwerk* and, therefore, does not present a substantial question for review by this Court.[4]

2. To avoid the inescapable conclusion that a substantial question is not involved, Petitioners assert that the decision of the Court of Appeals for the Second Circuit in *New York Shipping Association v. Federal Maritime Commission,* 495 F.2d 1215, *cert. den.* 419 U.S. 964 (1974) conflicts with the decision of the court of appeals in this case. Whatever difference of emphasis may exist between the decisions in the Second Circuit and the District of Columbia Circuit, such differences are not sufficient to convert an

[4]The Court of Appeals for the First Circuit agrees with the Court of Appeals for the District of Columbia Circuit; the judges of the First Circuit expressed "astonishment" that anyone would assert FMC jurisdiction over a union and multi-employer agreement reached through "eyeball-to-eyeball" negotiations. *Boston Shipping Ass'n. v. United States,* 8 S.R.R. 20,828 (1st Cir. May 31, 1972).

otherwise insubstantial question into one requiring the attention of this Court.

At the outset, it must be recognized that FMC had found in the *New York Shipping Association* case that the union's participation in development of the assessment formula in the collective agreement was merely "nominal,"[5] and the Court of Appeals for the Second Circuit fully appreciated that the substance of the challenged assessment formula incorporated in the collective bargaining agreement had been developed unilaterally by the employers in their own councils.[6] Consequently, such provisions could not have been the product of "eyeball-to-eyeball" bargaining.

Significantly, the challenged provisions developed unilaterally by the employer group in the *New York Shipping Association* case involved an assessment formula, like the one in the *Volkswagenwerk* case, which resulted in a disproportionate impact on employers of maritime labor so as to produce discriminatory charges. Notwithstanding the relationship of such assessment formulae to labor interests, the shipping interests affected thereby were therefore held to be direct and immediate. In this case, the court of

[5]*New York Shipping Association—NYSA—ILA Man-Hour/Tonnage Method of Assessment*, 16 FMC 381, 389 (1973) *aff'd sub nom. New York Shipping Association v. Federal Maritime Comm'n., supra.*

[6]*New York Shipping Ass'n. v. Federal Maritime Comm'n., supra* at 1216. The court observed that the union was "primarily" concerned with the collection of the assessments and that its lack of concern as to how the assessment formula allocated costs among employers was demonstrated by the fact that the assessment formula incorporated in the collective bargaining agreement "was not changed from the one that [the employers] had unilaterally adopted" previously. *Ibid.* at 1222.

appeals held that no direct and immediate shipping interest is threatened by the challenged ILWU-PMA agreement. The Agreement pertains to work opportunities and terms and conditions of employment of registered dockworkers represented by ILWU, a subject that directly and immediately affects labor interests and, at best, only indirectly and remotely affects shipping interests. The different impact of the contractual provisions challenged in this case and those challenged in the *New York Shipping* case sharply distinguishes the decision of the Court of Appeals for the District of Columbia Circuit from that of the Second Circuit.

That two different courts of appeals reached predictably different conclusions on different factual records hardly calls for this Court's intervention. This Court's business of resolving real conflicts is heavy enough; it should not have the additional burden of dealing with questions which the courts of appeals have quite properly disposed of on their separate and discrete facts and which, on analysis, present no basic conflict between circuits.

3. Petitioners are led to their position by refusing to recognize ILWU's direct interest in the non-member agreement negotiated with PMA. ILWU is certified by the NLRB to represent all dockworkers employed on the Pacific Coast.[7] As such, it is directly concerned with maximizing the work opportunities of dockworkers and obtaining the full range of benefits of the pension, welfare, vacation, and pay guarantee

[7]*Shipowners Ass'n of the Pacific Coast*, 7 NLRB 1002 (1938).

programs for them, regardless of how the cost is allocated and of whether or not the employer is a member of PMA.

ILWU had previously bargained with employers who are not members of PMA regarding their participation in these programs and had thereafter solicited PMA's consent to participation by such non-members. ILWU has, however, quite properly recognized that PMA's consent may not be compelled as a matter of right, but that PMA is entitled to withhold such consent unless ILWU will make appropriate concessions. This is the essence of collective bargaining. ILWU has appreciated that, as these programs have developed more cost significance in the ILWU contract settlements with PMA, PMA would seek ways to contain the costs thereof, one of which could be the contraction of the registered work force.[8] ILWU has recognized that a further reduction in the registered work force would undoubtedly produce further impetus for decasualization of longshore employment and insistence by PMA members for preference in the employment of registered dockworkers whose economic security is primarily dependent upon ILWU-PMA contracts and programs. ILWU's concerns regarding the impact of these developments on the employees in the bargaining unit produced a difference of view with PMA. This difference of view led to a mediation and ultimately to eyeball-

[8]The Mechanization Agreement that spawned the *Volkswagenwerk* case has resulted in a significant contraction of the work force.

to-eyeball negotiations between ILWU and PMA that produced the Agreement.

The court below, unlike the FTC, has fully appreciated ILWU's interests in these matters (Petition, Appendix A at p. 3a, fn. 1). By seeking a reversal of the court of appeals decision and a reinstatement of the FMC decision, Petitioners ignore these substantial labor interests.

Petitioners would, in addition, subject maritime collective bargaining to a unique regulatory system in which, whenever shipping interests became involved (howsoever remotely) with labor interests, the FMC would have jurisdiction to review and pass judgment on the labor-management settlement prior to its implementation.[9] ILWU has no illusions as to how such reviews of its contracts will be undertaken by an executive agency on which sit only management, and no labor, representatives.

The FMC has no expertise in labor-management relations, as its handling of this case demonstrates. The FMC conclusion that the Agreement did not involve subjects for mandatory bargaining resulted, in part,

[9]This view was expressed by Justice Harlan in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, supra,* at 283-291. However, it would appear that Justice Harlan believed such FMC judgment should result in granting for some labor agreements an exemption from application of the Shipping Act, 1916, *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, supra* at 287. The court below stated that even if it were to adopt Justice Harlan's balancing test, the Agreement would be exempt from filing with the FMC (Petition, Appendix A at p. 35a). Moreover, a labor contract resulting from good faith bargaining was not before Justice Harlan and therefore the impact of the anti-injunction legislation and decisions discussed below was neither raised nor considered by him.

from its unfamiliarity with the responsibilities of a collective bargaining agent and the importance of fringe benefits to wage settlements.[10] It also resulted, in part, from an uninformed view of the function of a collective bargaining agreement.[11]

The FMC concluded that ILWU has no interest in the challenged portions of the Agreement because, *inter alia,* they promote the interests of the employer parties. The FMC obviously believes that a collectively bargained agreement can be bifurcated between union and employer interests. The realities are very different. A review of the Agreement (JA 452-454) will disclose a union interest in the subject of each clause thereof, notwithstanding the fact that the benefits to the employees have not always been maximized by the negotiated compromise of the parties. The process of give-and-take required by good-faith collective bargaining is designed, however, to produce agreements to which management and labor can give allegiance in their entirety as containing a workable solution to their disparate interests. Stability of labor-management relations will hardly be achieved if, after strenuous eyeball-to-eyeball bargaining, one of the

[10]It is well settled that work opportunities and fringe benefits such as pensions are mandatory subjects of bargaining. *National Woodworkers Mfrs. Ass'n v. NLRB,* 386 U.S. 612 (1967); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964); *Hinson v. NLRB,* 428 F.2d 133 (8th Cir. 1970); *Inland Steel Co. v. NLRB,* 170 F.2d 247 (7th Cir. 1948); *cert. den.* 336 U.S. 960 (1949).

[11]It should be noted that Commissioner Morse, former Chairman of the FMC and most experienced member of the present Commission, agrees that the agency lacks "expertise in the labor-management field" (Petition, Appendix A at p. 74a).

parties is denied the consideration supporting its agreement to the settlement. Such frustration of the operation of an agreement necessarily will result in its reopening with the unsettling effects which renegotiation will entail.

In addition, the FMC has been established to balance the economic interests of carriers and shippers, each of which has repeatedly condemned, as inimical to shipping interests, wage settlements negotiated by maritime unions. There can be little doubt that, if such an agency has jurisdiction to scrutinize the effects of maritime collective agreements, the contractual benefits won by maritime labor will soon be diluted. The FMC has already demonstrated its insensitivity to labor interests. While conceding that it lacks jurisdiction to regulate ILWU or any union as a person regulated by the Shipping Act,[12] the FMC did not hesitate in this case to nullify and render inoperative a collective bargaining agreement won by ILWU after hard bargaining.

There is little doubt that a procedure which forecloses implementation of a collective agreement absent agency approval substantially substitutes executive fiat for collective bargaining. Labor agreements involve dynamic matters, controlling as they do the economic welfare of thousands of families tied to an industry and, in many instances, such agreements determine the well-being of the entire community where these families reside. Delay in implementation can produce intolerable hardship. Petitioners appear to

[12]*New York Shipping Association, supra,* 16 FMC at 391.

appreciate this fact but urge that there is a discretionary power in the FMC to grant interim approval which would be a sufficient safeguard of labor's interest (Petition, 16). They ignore, however, that, as shown by PMA's brief, this is a doubtful power, rarely exercised, and that it is more likely than not that the FMC will be persuaded to withhold interim relief by the very economic interests it has been constituted to protect.

Petitioners' position on this issue is that a process requiring advance approval of collective agreements in the maritime industry is preferable to the process which prevails in every other industry where collective agreements are immediately implemented and enforced until a federal court, after a full trial, finds a violation of antitrust laws (Petition, 16). Petitioners do not recognize that this view is unsupported by any provision of the Shipping Act or its history. Nor do they recognize that this view was not adopted by this Court in *Volkswagenwerk*. There this Court, noted that the case before it did not involve an agreement between ILWU and PMA but only an agreement among employers and specifically said it was not grafting onto the collective bargaining processes of the maritime industry the dilatory Section 15 procedures.

Moreover, Petitioners also ignore that a process requiring advance approval of maritime labor contracts by the FMC is tantamount to an automatic preliminary injunction restraining implementation of such agreements without any showing that they con-

tain substantive violation of law or that equitable considerations require such relief. This is in a dramatic contrast to the requirements of the Norris-LaGuardia Act, 29 U.S.C., § 101 *et seq.*, which effectively withdraws from the federal courts jurisdiction to issue preliminary injunctions and temporary restraining orders with respect to labor activities and labor contracts merely because violations of the antitrust laws are alleged. See *Milk Wagon Drivers' Union Local 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 103 (1940). The adoption of Petitioner's position would constitute a reversion to use of the labor injunction: a use which has been discredited and abandoned by the development of the public policy embodied in federal laws regulating labor-management relations. *United States v. Hutcheson,* 312 U.S. 219 (1941). Such a reversion to repudiated practices is aggravated by the fact that an executive agency which by its charter and its structure is management oriented, may well exercise, if Petitioners prevail, a power that Congress concluded could not be entrusted even to the independent federal judiciary.[13] It is a sensitivity to considerations such as these that is reflected in the decision of the Court of Appeals for the District of Columbia.

4. Nor is there any occasion for this Court to reconsider the lines drawn in the *Volkswagenwerk*

[13]While the National Labor Relations Act has partially restored jurisdiction to the federal courts to grant injunctions in certain labor cases, the power is tightly circumscribed and limited to cases involving specific unfair labor practices under the National Labor Relations Act, as amended. See 29 U.S.C. §160(1).

case. If there is a need to protect shipping interests from illegal trade practices allegedly embodied in a collectively bargained labor agreement, the federal courts provide an adequate forum. Despite the very substantial reservations that ILWU has concerning the manner in which legitimate labor interests are once again being circumscribed by application of the antitrust laws, it agrees with the court of appeals that, if a line need be drawn between labor and antitrust policies, the district court in the district where the challenged activities have occurred or have their greatest consequences is the proper forum for that purpose. This Court very recently has withheld from the NLRB, despite its acknowledged expertise in labor affairs, jurisdiction over such line-drawing, apparently believing that the district court with its antitrust expertise is the preferred forum for the resolution of these problems. *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975). The same district court, because it also has expertise in federal labor law, possesses the comprehensive vision to deal with all aspects of these problems: a vision denied a specialized agency equipped only to foster the limited economic interests of a single industry.

5. The second question presented by the Petition need not be reached if the Court agrees that a substantial question is not presented by the first question. In such case, the balancing of interests that Petitioners maintain should be undertaken by the FMC may be pursued by the nonmember complainants in

the proceedings they have already instituted in the district court if the Agreement is indeed subject to condemnation under the principles enunciated in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

However, even if the FMC may have jurisdiction under Section 15 of the Shipping Act over agreements which result in discriminatory burdens affecting tariffs, it is clear that that statute affords no basis for permitting the FMC to balance antitrust, labor, and shipping interests in the manner it here attempted with respect to the Agreement. Petitioners, in an effort to justify the FMC's nullification of the Agreement, maintain that it "imposes" terms of employment upon employers who are not members of the employer group with whom ILWU has negotiated the Agreement. Such characterization of the Agreement misconceives the relationship between ILWU and such nonmembers.

By the Agreement, ILWU won the assurance for nonmembers of the opportunity to employ registered dockworkers on an equality with PMA members, notwithstanding that the latter have assumed the primary responsibility for the economic security of registered dockworkers. Also, nonmembers were afforded the opportunity of securing, on nondiscriminatory terms for the dockworkers employed by them, the advantages of the industry fringe-benefit programs. Whether nonmembers intend to take advantage of such opportunities depends upon the outcome of negotiations between them and ILWU, which has

not foreclosed itself from bargaining in good faith with nonmembers. That fact significantly distinguishes the Agreement from the agreement involved in the *Pennington* case, *supra,* under which the union allegedly bound itself to compel outsiders to accept specific, ruinous terms and conditions of employment.

The fact that the Agreement does not foreclose negotiations between nonmembers and ILWU has been recognized by the FMC; but the FMC erroneously presumed that nonetheless the Agreement imposes burdens on nonmembers. (Petition, 71a). However, the cost of using the registered work force and participating in the ILWU-PMA fringe-benefit programs may in fact be substantially less than the cost of any alternative proposals that nonmembers could develop. (JA 177, 188).

Apparently, FMC believed that nonmembers should first settle in their negotiations with ILWU the terms upon which they participate in ILWU-PMA programs and that ILWU could then compel PMA to accept those terms, notwithstanding that those terms favor nonmembers at the expense of PMA members and dockworkers; otherwise, there is no sense to the FMC condemnation of the Agreement that assures nonmembers access to industry fringe-benefit programs on equal and nondiscriminatory terms. This is indeed a curious view of what constitutes imposition of wage terms on outsiders to a bargaining group.

However, whatever the ultimate resolution of this question, it should be clear, as the court below held, that it does not involve shipping interests but

involves solely labor questions or at best the demarcation of labor and antitrust policies. It is also eminently clear that ILWU has a direct interest in how *that* question is resolved. Its resolution should not be undertaken by an agency that has no jurisdiction to regulate the activities of the ILWU. Clearly, a decision of the FMC that can deny ILWU the fruits of its collective bargaining is an effective regulation of ILWU activities.

To condone such an assumption of jurisdiction by the FMC over ILWU would deny to ILWU the right to be heard in the district court, the forum established by Congress for the determination of whether collective agreements violate antitrust policies. That denial is no small thing.

In the Norris-LaGuardia Act Congress substantially restricted the issuance by the district court of injunctions that preclude the implementation of collective bargaining agreements. Congress has said that in such a suit, legal, not equitable, remedies are available to persons claiming damage by illegal collective agreements; it has also said that in such a suit, the ILWU's right to a trial by jury will be protected by the Seventh Amendment[14] These important safeguards are wiped out if the FMC can act as petitioners propose here.

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[14] *Ross v. Bernhard,* 396 U.S. 531, 533 (1970); *Parsons v. Bedford,* 3 Pet. 433, 446-447 (1830); *Meeken v. Lehigh Valley R Co.,* 162 F. 354 (S.D.N.Y. 1908); *see also Dairy Queen v. Wood,* 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

Neither the important policies of the Norris-LaGuardia Act nor ILWU's fundamental civil rights should be lightly infringed; certainly not under a statute that has not heretofore been invoked for the regulation of labor activities and interests.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
February 4, 1977.

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